**RAJA HARUN MOHAMAD**

**v.**

**LIM BA BA & ANOR.**

HIGH COURT MALAYA, IPOH
PEH SWEE CHIN J
[CIVIL SUIT NO. 1134 of 1984]
15 NOVEMBER 1986

***TORT:*** *Injuries suffered in accident while working - Plaintiff sued employer and factory owner for negligence - Breach of statutory duty - Factories and Machinery Act 1967, s. 10 - Workmen's compensation - Whether bars the present action against factory owner from point of view of common law - Whether both claims can be filed - Tortfeasor.*

***CIVIL PROCEDURE:*** *Interlocutory judgment entered in default of appearance - Application to set aside default judgment - Defence on the merits.*

The plaintiff sued for damages for injuries sustained in an accident while working as a servant for the 1st defendant ("the employer"), but in a factory occupied and owned by the 2nd defendant ("the factory owner").

The plaintiff sued the employer for negligence, alleging, *inter alia*, failure to provide a safe system of work, and claimed against the factory owner for negligence as an occupier and breach of statutory duty under s. 10 of the Factories and Machinery Act 1967 ("the Act").

These proceedings concerned only the factory owner against which interlocutory judgment was entered in default of appearance, pending assessment of damages which were subsequently assessed in Court, which together with interest and costs amounted to RM19,442.03 as in February 1986.

The factory owner applied to set aside the default judgment.

**Held:**

**[1]** It is settled that in an application to set aside a default judgment, if the default judgment is irregular, an applicant is entitled to have it set aside *ex debito justitiae*, but when it is regular, there must be, as a rule, an affidavit of merits from the applicant.

**[2]** Even assuming that the workmen's compensation was agreed to and accepted by the plaintiff from the employer, that would not bar the present action against a tortfeasor i.e., the factory owner from the point of view of common law, and also as an owner of a factory at the same time, which could be liable for damages under the Act.

**[3]** Section 20 of the Act makes it clear that both claims, *viz*. against the employer for workmen's compensation, or a Court action against a tortfeasor (the factory owner) for damages could be made or filed, without one claim barring the other but the plaintiff could not keep both sums under both the claims, and that means he could keep the larger sum, i.e., the sum of RM19,442.03 awarded in this action in preference to the smaller sum, i.e., RM109.88 awarded as workmen's compensation.

**[4]** In view of the circumstances, the factory owner did not have a defence on the merits.

*[Application dismissed with costs.]*

**Cases referred to:**
*Azimah bte Ismail & Ors. v. Chang Ng Pang & Ors. [1985] 2 MLJ 152*
*Lee Yen & Ors. v. Kepong Mines Ltd. [1963] MLJ 396*
*Ho Teck Fah v. Looi Wah t/a Looi Construction [1981] 1 MLJ 162*

**Legislation referred to:**
Factories and Machinery Act 1967, s. 10
Workmen Compensation Act 1952, ss. 19(3), 20, (a), 28, 41, (a), (b)
Rules of the High Court 1980, O. 62 r. 12

*For the plaintiff - Muthu; M/s. S. Muthu & Co.*
*For the defendants - N.T. Rajah; M/s. Maxwell, Kenion, Cowdy & Jones*

**JUDGMENT**

**Peh Swee Chin J:**

The plaintiff herein sued for damages for injuries sustained in an accident while working as a servant (and this was common ground), for the 1st defendant (hereinafter called the employer), but in a factory occupied and owned by the 2nd defendant, (hereinafter called the factory owner).

It was alleged in the statement of claim that the plaintiff was loading oil palm fruits at a conveyor when it suddenly stopped as some oil palm husk jammed the same. When plaintiff tried to remove the said husk, the conveyor moved again with plaintiff's arm getting caught by the conveyor.

Plaintiff sued the employer for negligence, alleging, *inter alia*, failure to provide a safe system of work, and claimed against the factory owner for negligence as an occupier and breach of statutory duty under s. 10 of the Factories and Machinery Act 1967. This much was very clear from the plaintiff's statement of claim.

The proceedings which are being dealt with now and for which I am now giving my reasons or grounds of judgment, concerned only the factory owner, against which, interlocutory judgment was entered in default of appearance, pending assessment of damages which were subsequently assessed in Court, which, together with interest and costs amounted to RM19,442.03 as in February 1986.

The factory owner applied to set aside such default judgment. In the affidavits filed in support of such application, the following matters were alleged:

(1) Service of the writ was effected at the office of the factory owner on a clerk who had failed to notify the "executive officers" of the factory owner of such service.

(2) The plaintiff wrote a letter dated 21 September 1984 to the Commissioner for Labour in the matter of claim for workmen's compensation stating that he agreed to accept RM109.88, and that apparently in pursuance thereof, the employer deposited the said sum with the Commissioner for Labour. It was contended that such deposit was a sufficient discharge and was a bar to a suit for damages against the employer in this action.

(3) To exclude liability, the factory owner quoted and relied on, apparently, s. 20(a) of Workmen's Compensation Act (herein after called the Act).

(4) No notice of hearing of assessment of damages was served on the factory owner, and the subsequent order for damages obtained was therefore irregular.

(5) To exclude liability, the factory owner relied on s. 28, ss. 41(a) & (b) of the Act.

(6) The factory owner relied on s. 19(3) of the Act.

In amplification of the above matters in the affidavits, learned Counsel for the factory owner submitted that the application by the plaintiff to the Commissioner constituted a bar to any suit being filed. He further submitted to the effect that the factory owner was not the master of the plaintiff. He submitted that the plaintiff had made an application to the Commissioner for Labour to settle the questions.

In the affidavit filed on behalf of the plaintiff and submission of learned Counsel for the plaintiff, the following matters were also raised in reply:

(1) The writ was served on the factory owner on 6 September 1984 and for 5 months, no appearance was entered before interlocutory judgment was entered. There was undue delay. Judgment obtained in default of appearance was regular as the writ was duly served.

(2) The plaintiff had not accepted the amount of workmen's compensation deposited and no memorandum of agreement to accept any compensation was signed under s. 28 of the Act by both the plaintiff and the employer.

(3) The factory owner had nothing to do with the application for workmen's compensation which was only between the employer and the plaintiff.

(4) None of the requirements of s. 41 of the Act had been complied with. The cases of *Azimah bte Ismail & Ors. v. Chang Ng Pang & Ors.* [1985] 2 MLJ 152 and *Lee Yen and Ors. v. Kepong Mines Ltd.* [1963] MLJ 396 were cited in support.

(5) The Court had notified both the plaintiff and the factory owner about the hearing of the assessment of the damages and that even if the factory owner had not in fact received such notice, by O. 62 r. 12, it was not necessary to serve such notice on the factory owner in the event of non appearance by the factory owner.

It is settled that in an application to set aside a default judgment, if the default judgment is irregular, an applicant is entitled to have it set aside *ex debito justitiae*, but when it is regular, there must be, as a rule, an affidavit of merits from the applicant, in other words, the applicant must establish a default on the merits.

On the question of service of the writ, it was never alleged that the office at which the writ was served was not the registered office or the office of the factory owner. The fact that the clerk had failed to bring the matter of service to the attention of the "executive officers" of the factory owner was beside the point. On the question of service of a notice of hearing for the assessment of damages pursuant to interlocutory judgment obtained in default, assuming that the notice sent by the Court was not received by the factory owner through the post, then in my view, on account of the absence of a further and express provision that such notice must be served personally on a party in the shoes or same position of the factory owner, service of such notice of hearing for such assessment would be deemed by O. 62 r. 12 of the Rules of the High Court to have been effected on the plaintiff's solicitors by sending to or filing with the learned Senior Assistant Registrar of this Court, the letter or written communication asking for a date for hearing the assessment of damages as was done in this case. In any event, it would not appear to be material as to whether such notice of hearing of assessment of damages was in fact served or not served on the factory owner, for like a second or subsequent domino when the first or prior domino falls, if the interlocutory judgment in default was set aside, the damages assessed in pursuance thereto,

would also fall or would be set aside *ipso facto*. I was of the view therefore that the default judgment concerned herein was obtained regularly in view of the due service of the writ in the first place.

On the question of establishing a defence on the merits, first and the foremost, it must be stressed, in order to avoid any confusion, that the matter of workmen's compensation was taken up with the Commissioner for Labour as between the plaintiff and the employer, a process in which the factory owner took no part and neither was it a party thereto. Secondly it must be emphasised that the factory owner was sued as occupier and owner of the factory in which the plaintiff sustained injuries therein. Since the factory owner was sued as occupier of the factory, the plaintiff, it goes without saying, must have sued as an invitee to the factory at common law, in addition to a claim for breach of statutory duty, under the Factories and Machinery Act 1967 while working as a worker in the factory of the factory owner.

Even assuming that the Workmen's Compensation was agreed to and accepted by the plaintiff from the employer, would that thereby bar the present action against the factory owner, not being the master of the plaintiff, but the occupier of the factory to which the plaintiff was an invitee from the point of view of common law, and also a person who worked in the factory owned by the factory owner from the point of view of the Factories and Machinery Act 1967. In my judgment, that would not bar the present action against a tortfeasor - i.e. the factory owner from the point of view of common law, and also as an owner of a factory at the same time, which could be liable for damages under the said Factories and Machinery Act 1967. Please see *Ho Teck Fah v. Looi Wah t/a Looi Construction* [1981] 1 MLJ 162 about liability of a factory owner for such damages under the Factories and Machinery Act 1967. As if to remove the matter beyond peradventure, s. 20 of the Act, provides as follows:

> Section 20. Where an injury for which compensation is payable under this Ordinance was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof:
>
> (a) the workman may take proceedings against that person to recover damages and may claim against any person liable to pay compensation under this Ordinance, but he shall not be entitled to recover both damages and compensation; and
>
> (b) if the workman has recovered compensation under this Ordinance, the person by whom the compensation was paid, and any person who has been called upon to pay an indemnity under sub-section (2) of s. 19 shall be entitled to be indemnified by the person so liable to pay damages as aforesaid and all questions as to the right to and amount of any such indemnity may, in default of agreement, be settled by an Arbitrator.

Section 20 of the Act makes it clear that both claims, *viz*. against the employer for workmen's compensation, or a Court action against a tortfeasor (the factory owner) for damages could be made or filed, without one claim barring the other but the plaintiff could not keep both sums under both the claims, and that means, in effect and practice, in regard to the instant case, he could keep the larger sum, i.e. the sum of RM19,442.03 awarded in this action in preference to the smaller sum. i.e. RM109.88 awarded as workmen's compensation. It will be remembered that s. 20 was also relied on by the factory owner. Since this question of the claim for workmen's compensation barring the claim for damages in this action was the only relevant issue raised by the factory owner and since this question was, as explained, doomed to fail, it would be most unjustifiable to subject parties hereto to costs of further and prolonged litigation; as after all, it could not and did not amount to a defence on the merits.

I do not think it is necessary to refer to the other irrelevant contentions of Counsel on the various other provisions of the Act in connection with the claims for workmen's compensation though no mention from the factory owner, by way of establishing a defence on the merits, was ever made in reply or in connection with the claim by the plaintiff as an invitee to the factory or a worker in a factory under the Factories and Machinery Act 1967.

I therefore dismissed the factory owner's (the 2nd defendant's) application with costs.

Also found at [1986] 2 CLJ 462